

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

MICHAEL CALLAGHAN,

Plaintiff,

v.

CIVIL ACTION NO. 2:12-cv-03419

NATALIE E. TENNANT, *et al.*,

Defendants.

**DEFENDANTS' RESPONSE IN OPPOSITION
TO PLAINTIFF'S MOTION TO EXPEDITE**

Now come all Defendants and for their Response to Plaintiff's Motion to Expedite (Doc. 26), say:

1. As this Response was being drafted, the Attorney General filed a Motion to Intervene in the mandamus action pending before the West Virginia Supreme Court of appeals – *Loughry v. Tennant, et al.*, No. 12-0899 – and filed a 20-page amicus brief. In addition, the Plaintiff herein, Michael Callaghan, filed today his own 31-page amicus brief.¹

2. Responses to the aforesaid filings are due on August 28, 2012 and August 31, 2012, the latter being the same date that Plaintiff proposes to require that the Defendants also respond to his Motion for Preliminary Injunction.

3. While there are some issues that may be common to the two cases, there are significant differences that require the filings in the two cases to be fundamentally different. For

¹All of these recent documents may be viewed online at <http://www.courtswv.gov/supreme-court/clerk/cases-of-interest.html>.

example, the *Blackwelder* factors governing disposition of a motion for preliminary injunction are unique to the federal litigation, as would be the abstention defense raised by Defendants' Answer.² Unique to the State litigation are assertions in the Petition for Mandamus that the Respondents in that action (Defendants in this action) were required to disburse public funding regardless of federal court decisions that suggested otherwise, based on allegations that State officers lack discretion to question the constitutionality of the statutes that they administer.

4. The undersigned counsel would find it not just difficult, but impossible, to prepare the required filings in both cases if Plaintiff's proposed schedule were adopted.

5. The "matching funds" in dispute before the Supreme Court Appeals were required solely because of reported expenditures by the campaign of Robin Davis, and were not triggered by any third-party expenditure, nor by any contribution to the Davis campaign. (See Affidavit of Timothy Leach, appended directly hereto.)

6. Per the terms of the statute challenged in this proceeding (W. Va. Code § 13-12-13), a contribution to the campaign of a traditionally funded candidate competing with the Intervenor's candidacy would not trigger any additional funding for the campaign of the Intervenor – Allen Loughry.

7. Plaintiff Callaghan asserts in his Motion for Preliminary Injunction that his desire to contribute or make independent expenditures has been chilled by the prospect that either would trigger matching funds for the candidacy of Allen Loughry. However, the only purpose of his

² Defendants had planned to file and brief a Motion to Abstain in accordance with the Court's existing scheduling order. No such motion has been filed to date.

request for an expedited schedule is to prevent the disbursement of funds that were triggered by *neither* a contribution to a campaign *nor* an independent expenditure.³

8. Plaintiff Callaghan's desire for an expedited schedule is to allow this Court to enjoin, should it be necessary, enforcement of a possible final decision of the State's highest court. Basic principles of comity and federalism suggest that a court should not lightly entertain a party's desire to accelerate litigation solely to anticipate and forestall the actions of another court with concurrent jurisdiction.

WHEREFORE, Defendants pray that Plaintiff Callaghan's Motion to Expedite be denied.

Respectfully submitted,

NATALIE E. TENNANT, in her official capacity
as West Virginia Secretary of State; NATALIE E.
TENNANT, GARY A. COLLIAS, WILLIAM N.
RENZELLI, and ROBERT RUPP, in their official
capacities as members of the West Virginia
State Election Commission, Defendants,

By counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

/s/ *Silas B. Taylor*

Silas B. Taylor
Managing Deputy Attorney General
Office of the Attorney General

³ While it is true that an independent expenditure would generate such funds per West Virginia Code § 13-12-11(f), the actual "matching" payment currently due to Mr. Loughry under state law is *not* being made pursuant to that section, but rather pursuant to Code § 13-12-13(e) – to match expenditures made by Robin Davis's campaign. Thus, even if Mr. Callaghan were to ultimately prevail on his argument that independent expenditures may not be matched, such an argument would not impact the funds currently in dispute, and there is, thus, no need for an expedited schedule to prevent their disbursement should the Supreme Court of Appeals so order.

State Capitol Complex
Building 1, Room E-26
Charleston, West Virginia 25305-0220
Telephone: (304) 558-2021
Fax: (304) 558-0140
E-mail: silasbtaylor1@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2012, I electronically filed the foregoing “Defendants’ Response in Opposition to Plaintiff’s Motion to Expedite” with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

Marc E. Williams
Randall L. Saunders
Jenna E. Hess
Nelson Mullins Riley & Scarborough, LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
marc.williams@nelsonmullins.com

J. Adams Skaggs, Esq.
Matthew Mendendez, Esq.
Brennan Center for Justice
at NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, New York 10013

Anthony Majestro, Esq.
Powell & Majestro, PLLC
405 Capitol Street, Suite P-1200
Charleston, WV 25301
cmajestro@powellmajestro.com

/s/ *Silas B. Taylor*
Silas B. Taylor
Managing Deputy Attorney General
Office of the Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, West Virginia 25305-0220
Telephone: (304) 558-2021
Fax: (304) 558-0140
E-mail: silasbtaylor1@gmail.com